

Lonely Libertarian: One Man's View of Antidiscrimination Law

LEA BRILMAYER*

In his recent book, Professor Richard Epstein attacks antidiscrimination law from three different philosophical points of view: utilitarian, libertarian, and freedom of contract. None of these arguments is compelling as applied to a legal regime as popular as Epstein admits core antidiscrimination law to be. Epstein's critique of antidiscrimination law rests on a belief that our preferences not to discriminate or to be discriminated against — our tastes for nondiscrimination — are silly, a belief that is flatly inconsistent with the subjective preference orientation that Epstein uses to defend the taste to discriminate.

I. INTRODUCTION

Some people would be dismayed to find their ideas almost universally rejected, but not Richard Epstein. Epstein relishes the opportunity to challenge intellectual taboos, to defend the counterintuitive — indeed the unthinkable. This puts his critics at something of a motivational disadvantage. What psychological satisfaction can you possibly get from standing up courageously for something generally taken to be obvious? Where is the romance? Where is the thrill? Who wants to play Goliath to Epstein's David? Why, in other words,

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would you want to waste your energy showing that antidiscrimination law can be defended?¹

Epstein scoffs at the notion that being in the majority — indeed, in the vast majority — lends credibility to one's views.² And it is true in many situations that spouting received wisdom demonstrates nothing more than mindless conformity. The desirability of antidiscrimination law, however, is not such a situation. While academics almost universally approve of Title VII,³ approval is not limited to the academic community, nor even to the community of professional politicians. As Epstein himself clearly recognizes, the core antidiscrimination principle — prohibition of disparate treatment — is very widely accepted in the public at large.⁴ My argument here is that this far-reaching popular acceptance (as contrasted with the narrower intellectual acceptance in the academic community) provides a strong argument on behalf of Title VII.

Now, one might argue that substantive popularity is adequate basis for statutory policy if one were a simplistic majoritarian democrat — such a simplistic democrat would argue that the fact that the majority wants antidiscrimination law is enough to show that it is justifiable. That is not my argument. It is clear that Epstein is not a simplistic majoritarian democrat, and neither am I. The argument that overwhelming consensus counts as a good reason for antidiscrimination law is grounded, instead, on philosophical premises that Epstein himself should find more intellectually congenial, premises that figure in his unstinting rejection of antidiscrimination policy. Unfortunately, it is not completely clear which philosophical premises Epstein himself adopts; for this reason we will examine three different positions which figure at different times into his critique of antidiscrimination law. They are utilitarian, libertarian, and freedom

1. It is unclear whether Epstein's claim is simply that antidiscrimination law is morally and politically unjustified, or whether he is also claiming that it is unconstitutional. While most of the discussion in his book concerns political morality, his discussion of (for instance) *Lochner v. New York*, 198 U.S. 45 (1905), also suggests that he would invalidate much legislation on constitutional grounds. *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 99 (1992) [hereinafter *FORBIDDEN GROUNDS*]. I plan to focus primarily on the political morality arguments, which seems also to be the main focus of Epstein's arguments.

2. *FORBIDDEN GROUNDS*, *supra* note 1, at 6.

3. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1981 & Supp. 1993). I focus mainly on Title VII for purposes of illustration; many (but not all) of my arguments would apply to other antidiscrimination laws. The focus on Title VII is justified because it is the statute that Epstein himself addresses at greatest length. I should also emphasize that it is not the fine points of Title VII that I am addressing — whether *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), was correctly decided, for instance. I mean to address the basic issue of whether it is justifiable generally to have statutes that are designed to reduce or remedy discrimination.

4. *FORBIDDEN GROUNDS*, *supra* note 1, at 1.

of contract arguments. While it is unclear which one of these is Epstein's major foundation, none of them really supports the conclusion he reaches in a situation where the vast majority of citizens prefer to have a law prohibiting discrimination.

So Epstein's argument should really be addressed to the population at large, not to politicians, academics, or judges. As long as the general population remains convinced that Title VII and like-minded statutes are beneficial, the fact that some academics (or, even, all academics) find this view misguided is of little consequence. It is possible that *Forbidden Grounds* will be a runaway best seller, and will convince large numbers of Americans that our antidiscrimination laws are unjust and inefficient. It is hard to say.⁵ I am waiting until then to undertake the somewhat harder job (but still, I think, a worthwhile and manageable one) of convincing Americans that they should want to have a law like Title VII, and of justifying adopting such a law when there is not such nearly universal approval.

II. THREE CRITIQUES OF TITLE VII

To explain the significance of the far-reaching consensus on Title VII, we need first to identify the foundation for Epstein's critique. There are three themes: utilitarianism, libertarianism, and freedom of contract. At most points, these three fit together reasonably well in Epstein's broad assault on Title VII, and Epstein does not differentiate between them (indeed, he relies selectively on all three, as suits his immediate purpose.) But these are in theory different philosophical foundations, and the significance of consensus varies depending upon which theory is at issue.

The first basis for criticism is utilitarian. Epstein's complaint against Title VII seems at times to be that it is inefficient in the Kaldor-Hicks sense.⁶ The goal of utilitarianism is to maximize the total amount of benefit ("utility") to society at large, without regard to distributional concerns. Epstein sounds the utilitarian theme when (for instance) he describes how costly Title VII is, how much litigation it encourages, and so forth. These considerations would not be

5. Judging by the most recent New York Times best seller lists, it seems that the book's chances would be greatly improved with a different subtitle, such as "Forbidden Grounds: How To Satisfy a Woman Every Time" or "Forbidden Grounds: The True Story of Princess Diana."

6. An arrangement is Kaldor-Hicks efficient if there is no alternative that is Kaldor-Hicks superior to it. An arrangement is Kaldor-Hicks superior to another if moving to it generates enough benefit that, in theory, the winners could adequately compensate the losers.

relevant under a libertarian or freedom of contract philosophy, for judicial activism to promote libertarian or freedom of contract objectives would also (for instance) encourage costly litigation. Furthermore, at times Epstein seems explicitly to suggest that government action is justified when it promotes overall utility.⁷ Utilitarianism is a consequentialist theory (it judges actions in terms of the consequences that they bring about); in this respect it differs from both libertarian and freedom of contract approaches, which focus on rights.

The second is libertarian. "Libertarian" is the philosophical category in which Epstein seems to feel most at home; he frequently refers to his position as a libertarian one.⁸ (He does not, to my knowledge, refer to his position as "utilitarian", although as I argue, some of his positions have a utilitarian cast.)⁹ This characterization fits in many respects. He is generally skeptical, for one thing, about the merits of governmental intervention — utilitarians, in contrast, have nothing against governmental regulation, per se, unless it diminishes utility. The early utilitarians, in fact, were not opposed to using governmental power as a tool of social engineering.¹⁰ In addition, libertarian arguments are relatively indifferent to consequences, and Epstein's concern for the consequences of his proposed policies is intermittent and easily distracted.

What, then, does the "libertarian" position consist of? There are many possible definitions, but the one that captures Epstein's fancy is that governmental intervention is permissible only to prevent and punish force or fraud.¹¹ The government is advised to depart from the apocryphal "state of nature" as little as possible. The best known modern libertarian, of course, is Robert Nozick, who argues that the only government that is justified is the minimalist "night watchman" state.¹²

Living in a state of nature is unsatisfactory, under the libertarian view, only because one's life plans are always in danger of being upset by theft, murder, rape, and other sorts of mayhem. While Epstein says little about why fraud is a special problem to be singled out for special treatment, presumably the reason is that it is a kind

7. FORBIDDEN GROUNDS, *supra* note 1, at 12, 24, 86-87, 91, 105.

8. *Id.* at 19, 503, 505.

9. I have not read all of Epstein's work. There are many things that I am willing to take on as the price of admission to an interesting symposium. Minutely examining Richard Epstein's corpus is not one of them.

10. Indeed, even Adam Smith seems not to have been a libertarian in the sense that Epstein apparently contemplates. See Sylvia Nasar, *Adam Smith Was No Gordon Gekko*, N.Y. TIMES, Jan. 23, 1994, at E6 (Adam Smith not opposed on principle to using government taxation to redistribute income).

11. FORBIDDEN GROUNDS, *supra* note 1, at 104-05.

12. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

of "theft over time." Fraud permits one party to take the other's property under false pretenses; when the defrauding party fails to live up to his or her promises, a voluntary grant of property is retroactively transformed into an involuntary one. We will return later to the question of why Epstein's list is as short as it is.

The third position is one of freedom of contract. Epstein clearly aligns himself with the freedom of contract perspective. Just as Epstein does not explicitly acknowledge the differences between the utilitarian and libertarian arguments, he also does not discuss how libertarianism and freedom of contract might diverge. They do, although the difference between these two is more subtle than the well known libertarian/utilitarian divide. First, notice that when Epstein offers a definition of libertarianism, he approves government intervention only to prevent force and fraud. Government intervention to enforce contracts is not on the list.

Now one might think that contract enforcement is subsumed under the category of preventing and penalizing fraud. But as teachers of torts and contracts know, contract and fraud are rather different causes of action. Without going too deeply into the specific elements that should constitute a cause of action for fraud it is clear that there are some contract actions that do not involve fraud at all. Assume that a seller of goods enters into a contract with all intentions of performing, but finds out shortly after the contract has been signed that she will be unable to perform, and notifies the buyer before the buyer has had any chance to rely. Where's the fraud? Rather than attempt to stretch the category to include all contract actions, Epstein would do better simply to amend his list of justifiable governmental actions to include contracts enforcement.

This would be easy enough for him to do; so let us assume that he agrees to this. Has this in any way changed the "libertarian" nature of his argument? There is a slight shift in emphasis, for libertarianism now includes more of an emphasis on positive rights against the government, rather than merely negative rights to be left alone. This is a point on which the basic thrusts of libertarianism and freedom of contract diverge. The libertarian focus is on keeping the government as close as possible to the state of nature; a violation of rights occurs when the government intervenes without adequate justification. The freedom of contract position, in contrast, imposes upon the government the obligation to step in and enforce contracts that have been made. Citizens, then, have a good complaint in at least some instances of governmental inaction.

Libertarians, admittedly, might have cause for complaint in certain instances of governmental inaction; where the government, for instance, declined to adopt laws penalizing murder. In that sense a libertarian might recognize positive rights against the government. But it is not clear that a libertarian necessarily recognizes affirmative rights of this sort; for this would compel the government to prohibit every action that it was entitled to prohibit. It would have, in other words, to exercise all of the power that it had; it would have no discretion to penalize anything off the list, and no discretion not to penalize anything on the list. And even if some libertarians were to acknowledge such positive rights against the government, Epstein has not recognized such rights, focusing instead on the outer limits of what a state may do. His focus seems to be on negative rights, in other words.

In contrast, freedom of contract seems to entail some affirmative rights — that the government enforce the contracts one enters into. (Perhaps freedom of contract might be interpreted to mean only that the government should not intervene with private enforcement mechanisms, but this seems unlikely given the well-known failure of private enforcement mechanisms in many cases.) This point raises the interesting question of what Epstein would say about an antidiscrimination law which took the form of a simple governmental declaration that discriminatory contracts would not be enforceable. This is a strategy that has been adopted with other sorts of contracts thought contrary to public policy, such as usurious contracts, or prostitution or gambling contracts. A black tenant, for instance, might be granted the right to invalidate his lease if he found out that he had been offered less advantageous terms than a similarly situated white tenant. A libertarian, it seems, would have no objection to such a law — a freedom of contract proponent apparently would.¹³

The final difference between the libertarian and freedom of contract position is simply that freedom of contract, by itself, is not the complete political philosophy that libertarianism is. On most issues, it takes no position. The freedom of contract theorist would put up with many sorts of government regulation that would offend a libertarian, so long as they did not interfere with consensual contractual relations. A criminal prohibition on expressing politically incorrect opinions would be of no concern to the free contract proponent; neither would extensive taxation to redistribute wealth.¹⁴ In this

13. Such a law would probably bother Epstein for all of the reasons that he raises against more traditional sorts of discrimination laws — it would (arguably) hurt minorities more than it helped them, it would cause litigation, etc. — and thus one expects that Epstein would oppose it. But this is only a guess.

14. Note that at one point Epstein suggests that taxation and wealth redistribution would be a better approach than antidiscrimination law. *FORBIDDEN GROUNDS*, *supra*

sense, freedom of contract is a much less restrictive theory than libertarianism, for all that it really rules out is contract interference while the libertarian theory rules out a large variety of other governmental measures.

These three philosophical theories fit fairly well together in the following sense; all are generally quite skeptical about interference with private markets. Indeed, Epstein acknowledges his general indebtedness to economic theory, which (depending on which version one adopts) might take on either utilitarian, libertarian, or freedom of contract coloration.¹⁵ Libertarian theory is hostile to market interventions for the same reason that it is hostile to virtually all other forms of governmental regulation: only force and fraud justify state coercion. Freedom of contract theory is more selective: market interventions are uniquely evil because they interfere with consensual agreements. Utilitarian theory is suspicious of most market interventions because consensual agreements are generally utility enhancing.¹⁶ All three theories seem poised to descend simultaneously on government efforts to interfere with private transactions.

With all of the philosophical heavy artillery that Epstein wheels into action and trains on Title VII, it is no wonder that the poor little statute appears so bedraggled by the end of the book. One is led to wonder whether it is fair to require that our antidiscrimination laws satisfy every conceivable political theory one might imagine. Epstein switches opportunistically from one high powered weapon to another, depending on which side of the target seems more vulnerable. Other authors equally suspicious of do-gooder legislation (Richard Posner and Robert Nozick come to mind) show a little more

note 1, at 12. This raises the question whether Epstein can really call himself a libertarian. One also wonders whether, if those avenues had been chosen instead of the antidiscrimination strategy, an equally convincing (!) book might not have been written from the libertarian point of view criticizing this choice of strategy. Note that if one believes Epstein, such redistributive measures could not be implemented as a matter of corrective justice alone, because the wrong party is being compensated; thus if he really believes that these measures are justifiable, he cannot really be a libertarian.

15. *Id.* at 7 (proposing an evaluation based on economic theory).

16. Note that utilitarianism does not limit its consideration to individuals who are parties to the transaction, as Epstein sometimes seems to. *See, e.g., id.* at 149, 415 (contract is the business only of the parties to it). In fact, a utilitarian would invalidate any contract which imposed greater costs than benefits on the world at large. Furthermore, the costs need not be of the "force or fraud" variety that libertarianism focuses on; if it caused me great psychological pain that the University of Chicago Law School be sold to a developer who planned to tear it down and put up a Kentucky Fried Chicken, this pain would have to be taken into account. Utilitarianism leads to the same result as freedom of contract, however, when no one other than the contracting parties has any interests at stake — although it does so for very different reasons.

respect for the Marquis of Queensbury's rules; they are willing to limit themselves to a single theoretical weapon before setting off on the hunt. In assessing Epstein's philosophical argument, it would be nice to know which one he is making.

But maybe his claim would be that no matter what theory one uses, Title VII still comes up lacking. It flunks every test. If that is the argument, one tends to wonder how the statute ever happened to get enacted — and why it has not since been repealed. How could a piece of legislation have so many defects and still be so popular? My argument in this article is that the general popularity of the core antidiscrimination principle — the prohibition on disparate treatment — casts doubt on Epstein's belief that discrimination law actually flunks these three theories. We will argue in just a moment for the relevance of popular consensus to these philosophical theories, but first we might pause to ask why, in fact, antidiscrimination norms have such far-reaching popular support.

III. WHY IS TITLE VII SO POPULAR?

Epstein complains that the positive case for Title VII law has never been made; it is (he says) simply assumed.¹⁷ As we will see at several points below, the fact that he finds this cause for complaint coexists somewhat nervously with his simultaneously-held belief that people are entitled to hold whatever preferences they choose, without justifying them to academics.¹⁸ Here I wish only to argue that it is rational to prefer equality, not that any other position is outrageous.¹⁹ Given the importance of antidiscrimination policy, the rather breezy arguments below are undoubtedly quite superficial; but that is probably appropriate under the circumstances.

Imagine that you are considering permanently leaving the United States, and there are two places to which you might emigrate. They have comparable climates, natural resources, and other attractions. The main difference between the two is in the way race relations are treated.²⁰ Both countries have rich people and poor people (in approximately equal numbers), but in state *A* there is no particular correlation between economic situation and ethnic identity while in state *Z* economic position is tremendously stratified along racial

17. *Id.* at 7.

18. *See, e.g., id.* at 75, 151. He apparently believes that one need not justify a preference to live, work, or study with people just like oneself, but that one needs to justify a preference for integration or equality.

19. On the question whether other positions are morally outrageous, I reserve my opinion for another forum.

20. Here I focus specifically on race relations, although the argument could also be framed in terms of other protected groups. I focus on race relations simply for purposes of simplicity of exposition.

lines. There is also a great deal more racial segregation in *Z* than in *A*, in business, religious institutions, private schools, residential areas, and so forth. More than a proportionate amount of crime is committed by certain ethnic group members in *Z*, and the victims of crime are disproportionately from the same ethnic groups. The jails are full of those group members in *Z*, while the universities are not. Life expectancy, infant mortality, and other health care indicators vary across racial lines. In *A*, in contrast, one's membership in a racial group is not predictive of much of anything.

Would it be absolutely nutty to take this difference into account in making one's choice between moving to *A* and moving to *Z*? I suspect that most Americans would find the difference a plausible reason for favoring *A*; this could well be true for members of the dominant ethnic group as well as for members of the disadvantaged group. One might, no doubt, look at *Z* and worry that somewhere down the line some version of Sarajevo (or Los Angeles or Crown Heights) was looming. One might be favorably impressed with the fact that you would have a much larger group of potential friends and acquaintances in *A* (where practical barriers to interracial mixing do not exist) than in *Z*. One might even find *A* to be a (pardon the expression) morally better society in which to bring up one's children.²¹ One might expect that there would be economic advantages to having all children grow up with the expectations that all careers are open to people from both races, so that they can safely make the investment in an education.²² I could list many other assumptions that one might be forgiven for making. I think that these are enough to suggest that the preference for *A* over *Z* is within the outer bounds of rationality.

There are two responses that Epstein might make to this comparison. First, he might argue it is impossible that a society such as *A* could exist that would compare favorably with *Z* on economic terms; equality is necessarily achieved at the expense of utility. Second, he might argue that while one might be acting rationally in choosing *A* over *Z*, that is not the choice we are now faced with. We live in *Z* (or something like it), and the question is whether it is possible or practical to try to turn our society into *A*.

21. Epstein, oddly, does not discuss personal morality at any place in his book. This makes me wonder whether the subject is not, for some reason, off limits, but since I cannot see why it should be I bring it up, although with some trepidation.

22. Epstein recognizes that division of sex roles may affect what career choices individuals may want to make investments in. See, e.g., *FORBIDDEN GROUNDS*, *supra* note 1, at 270.

The argument that *A* could simply not exist on an economic par with *Z* would be based on his claim that there are efficiency gains to segregation along racial lines. Epstein claims that it is not surprising that we like to work (or live, or whatever) with people who are like us.²³ I will admit that there is some validity to this argument, if he states the point that way. Not being a cigarette smoker, I find it very hard to conceive that I would want to share an office with one. I believe that segregating offices along such lines is probably efficient. But I do not feel that way about sharing an office with someone from a different religion. Epstein's mistake is to assume that when we think that we want to be with people who are "like" us, that "likeness" is unavoidably defined on racial lines. Stated this way, the point is far less plausible. It is hard to imagine that the people of *A* would somehow experience efficiency gains if they could somehow manage to segregate along racial lines. Racial segregation supplies no efficiency gains unless "being with people like you" means "being with people of your own racial group" and, in a society like *A*, it would not have that meaning.²⁴

Much of the support for antidiscrimination law probably comes from the sense that, in the long run, racial differences would not matter the way (say) cigarette smoking does.²⁵ To the extent that we now sometimes feel uncomfortable in cross-racial situations, according to this view, that discomfort is an artifact of our unfamiliarity and little more. In *A*, we would no more be concerned about ethnicity than many other interesting and important facts about people that make them who they are — family background, previous life experiences, tastes, and religious convictions, for example — that do not disqualify them as potential neighbors, roommates, or colleagues. Would we be more efficient if our workplaces were segregated by height? Only if height somehow had something to do with job performance. And the same is true for "invidious" discriminations.

Nowhere in his book does Epstein discuss the costs that come with ethnic divisions. It is somewhat astonishing that this book could so cavalierly advocate allowing racial segregation without ever mentioning the possibility of strife. Presumably, Epstein would say that the government must wait until ethnic warfare breaks out, and then step in on the grounds that the state is entitled to protect against "force

23. *Id.* at 45-46.

24. Conceivably, Epstein could argue that it is biologically determined that we will define "likeness" on racial lines. *A*, in other words, could not exist in the form I describe.

25. Indeed, some would probably criticize the liberal vision underlying civil rights law for precisely this reason. My argument may sound suspiciously like "add women and stir," but in fact it is not. For my picture of *A* assumes that all groups have an equal part in determining the nature of the society.

and fraud.”²⁶ Epstein’s confidence in the innocuousness of racial segregation has a somewhat macabre tone in light of the international reporting currently dominating our newspapers — Somalia and Yugoslavia are two examples, but they could easily be multiplied. One is tempted to say that under this approach to race relations, the only real problem with “ethnic cleansing” is that the ends do not justify the means.

Perhaps Epstein would not argue that no sane person could prefer *A* over *Z*, or that there is no way *A* could be as economically well off as *Z*. Instead he might raise the question of difficulties in making the transition. If our current society resembles *Z*, perhaps it is either impossible or impractical to make the transition to *A*. (We will examine below the question whether the transition might be impermissible for other reasons, such as rights violations.) The claim that it is genuinely impossible to make the transition seems implausible. Perhaps one might argue that once a society becomes racially polarized, racial identifications come to assume such importance that they can never be erased. One is entitled to doubt such a strong claim, however, and therefore to act on the opposite assumption. Some issues that previously divided us today assume much less importance — there was once much greater prejudice against Catholics, for instance. Prejudice against Asians is definitely less than it was one hundred years ago. Intermarriage is both a piece of evidence and a possible explanation, but greater familiarity with persons from different races is another factor.

The claim that greater familiarity will, over time, break down barriers seems at first to resemble an argument that Epstein rejects, namely the idea that tastes will change and that through social engineering the government can encourage such change.²⁷ Here, Epstein acknowledges that tastes do change — we no longer think that flight attendants should all be cute young things in flashy outfits — but asserts that it is not for the government to determine which tastes we should have.²⁸ Whatever one thinks of this argument about the sanctity of private preferences, though, it is beside the present point. The question is whether it is rational of the proponents of antidiscrimination law to think that their own tastes will change over time, given

26. But note that he thinks, in other contexts, that it is reasonable to take preemptive or prophylactic measures. See, e.g., *FORBIDDEN GROUNDS*, *supra* note 1, at 105 (prophylactic rules justified where case-by-case enforcement is costly).

27. He rejects this argument. *Id.* at 304.

28. *Id.* at 305-06.

that they want their tastes to come to reflect their judgments that *A* is superior to *Z*. There seems to be no reason to assume that this optimism is irrational (even if it might in fact turn out to be wrong).

It should be noted that one of the arguments that another libertarian makes about social engineering — Robert Nozick's claim that market behavior cannot be stamped out — is rather beside the point here. Nozick argues that it is pointless to use government to try to achieve a "patterned distribution" of assets (such as wealth equality) because as soon as the pattern is established, it will shortly be upset through voluntary transactions.²⁹ The coerced transition to the patterned distribution is never completed, for continued government intervention is necessary to maintain the preferred pattern. But it is far less plausible that the transition period will never be over in the achievement of a race-blind society. Once a factor is seen as virtually irrelevant, only a very strong impetus will work to revitalize the distinction. The problem with the racial dynamic is that it requires patience, forbearance, and generosity to diminish, not that once it virtually disappears it can emerge full blown at any time. Tolerance is self reinforcing.

These are surely matters on which reasonable people might differ. There are people on both the left and the right who assume that racial prejudice is ineradicable. Estimates of the cost are likely to vary even among those who find the goal of equality desirable and achievable. We do not have to be one hundred percent certain that a statute will be successful — at a low cost — before it becomes rational to adopt it. The argument here is a modest one, namely that the decision to try to move to a relatively race-blind society through the adoption of antidiscrimination law is a reasonable one, with which some people might in good faith disagree, but not patently irrational.

This is a rather tepid recommendation. But it is all that is required unless the adoption of Title VII somehow violates other constraints. At this point, we need to return to the possible philosophical foundations for Epstein's complaints. For it is possible that a decision to try to move toward a race-blind society might be within the bounds of minimum rationality, but nonetheless indefensible. To investigate these possibilities, we need to examine the impact of the three possible philosophical foundations on the adoption of antidiscrimination law.

29. NOZICK, *supra* note 12, at 160.

IV. THE PHILOSOPHICAL RELEVANCE OF CONSENSUS

The relevance of the fact that Title VII is so widely approved depends upon the precise philosophical basis for Epstein's attack. If Epstein's main complaint is utilitarian then one response is in order; the libertarian and freedom of contract theories require different responses. The problem with the first sort of objection to antidiscrimination law is that virtually universal approval tends to show that antidiscrimination policy advances utility. The problem with the second is that it is hard to discern whose liberty is infringed if most people do not want to discriminate anyway. The problem with the third is that freedom of contract is infringed only if there are at least two people who want to have a discriminatory contract that the law prevents; it is far from clear how many people there are with such preferences.

A. Utilitarianism

At first blush, it seems unlikely that a legal principle that is as widely approved — as Epstein claims that the antidiscrimination principle is — would be inefficient. There are, of course, some parts of our antidiscrimination law that are not nearly so popular; affirmative action is highly controversial, of course, and it is arguable that the disparate impact theory of *Griggs v. Duke Power Co.*³⁰ is also (although few lay people probably know about it.) But Epstein does not limit his criticism to these controversial provisions; he proposes to do away with antidiscrimination law in its entirety and would allow blatant displays of employer bigotry.³¹ I am taking him at his word, and focusing on this part of his proposal, what I have been calling the “core” of antidiscrimination law.

Epstein believes that this approval is misguided because it overlooks the many substantial costs that antidiscrimination law imposes; expenses for litigating Title VII cases, foregone efficiency gains from workplace segregation, and the like.³² He also doubts the positive value of Title VII, and thus in his view the costs clearly outweigh the benefits.³³ How is it possible for his “guesstimate” about the efficiency gains of Title VII to be so different from popular opinion?

30. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

31. FORBIDDEN GROUNDS, *supra* note 1, at 68 (defending decisions based on ill will); *id.* at 86-87.

32. *See, e.g., id.* at 242-66 (describing costly consequences of Title VII).

33. *Id.* at 27.

The reason for the divergence lies, in large part, in the fact that he chooses to discount many of the preferences that people in fact have about the society in which they live, and about its legal structure. Epstein apparently attaches little, if any, positive value to either integration or equality. If he did, he would have to consider whether these values were worth the costs that (in his view) antidiscrimination law imposes. But it is quite clear that many (in fact, probably most) people would prefer to live in a society that was more nearly race blind. That is why antidiscrimination law is widely approved. I asked earlier whether it was conceivable that someone would prefer to move to *A* rather than *Z*, on the grounds that *A* was much more racially equal. Whether it is conceivable or not, the fact is that many people actually do.

Similarly, Epstein fails to consider the preferences that we actually have about not being discriminated against. Epstein brushes aside the injury that someone experiences when he or she is discriminated against, saying that one can keep on hunting for a job, and will eventually find a job with the employer that most values his or her skills. But the injury one suffers from discrimination is not simply the injury of not getting one's first choice job (although that may be part of it.) Even if one had an outstanding job offer from a perfectly comparable second employer, which one accepted instantaneously on being discriminated against by the first, one might still feel the pain of discrimination. This is not a cost that Epstein bothers to take into account.

Of course, the reason that Epstein fails to take such "injuries" into account may be that he thinks they are simply silly. The person (black or white) who cares about equality per se, or the person who is hurt by the fact of discrimination over and above being denied a job, is just being psychologically ultra-sensitive. Many people who support antidiscrimination laws do so only out of some misplaced liberal baggage that they would do better to shed immediately. What really matters (Epstein perhaps thinks) is dollars and cents, not getting your feelings hurt or being offended by racial inequality.³⁴ One gets the impression that the last thing Epstein would want to do would be to take into account, in any way, the actual misguided do-gooder motivations people had in adopting Title VII and in continuing to elect politicians that support the antidiscrimination principle.

But Epstein cannot consistently give this reason for discounting such preferences while simultaneously criticizing other academics

34. Note that the fact that some injury is itself not monetary does not mean that monetary compensation is inappropriate. Nonphysical injuries are often compensated monetarily, for example by damages for pain and suffering.

who have their own view of what preferences it is "proper" for people to have. He takes some shots at Cass Sunstein, for instance, for suggesting that Title VII might be defended as a governmental effort to reshape private preferences along more egalitarian lines.³⁵ Who gave academics the right, asks Epstein, to tell ordinary people what preferences to have?³⁶ Good question.³⁷ If Epstein is going to ground his attack on antidiscrimination law on utilitarian foundations, he ought to be willing to take into account the preferences that people have without passing judgment on them. He who would live by consumer sovereignty must be prepared to die by consumer sovereignty.

Typically, people's attitudes towards rules of law are intimately bound up with the value judgments they make. They have opinions on what states of affairs are desirable, what they estimate the costs of achieving these states of affairs to be, and how they balance the gains, losses, and risks. Utilitarianism, as Epstein acknowledges, adopts a subjective theory of value that takes preferences at face value. Epstein may believe that our current preferences reflect decades of indoctrination into the supposed value of antidiscrimination law (and it may be true that the law is more widely accepted now than it was when it was first adopted). But this is no more a reason for disregarding them than the fact that our earlier preferences were, in part, a product of the social and legal situation that existed then. Epstein, I would imagine, does not want to delve into what he believes to be our preferences to be with members of our own ethnic group — preferences that some leftists would be happy to brand as a product of capitalist brainwashing. He should extend the same courtesy to preferences that happen not to coincide with his own view of the world.

There are two evident objections to this argument that Title VII is utility enhancing.³⁸ The first is that it seems to suggest that any statute popular enough to get passed must be acceptable to a utilitarian;

35. FORBIDDEN GROUNDS, *supra* note 1, 150-51.

36. *Id.* at 151.

37. If I were to decide to go into the business of telling people what preferences to have (and utilitarian theory does not invite this line of inquiry), I think that I would at least try to espouse preferences that I felt were morally defensible — and Sunstein's seem more appealing than Epstein's.

38. Note that I am not making the strong claim that our current regime is the very best that might be done, only the weaker claim that it is better than what Epstein proposes, given the preferences that we currently have. In this sense, one might say that our current regime does not "satisfy" utilitarianism because some other regime would be even more Kaldor-Hicks efficient.

utilitarianism would have no critical bite. The second is that if antidiscrimination law is as popular as Epstein and I claim, then why do we need a statute prohibiting discrimination? There are easy answers to both of these questions in the standard economics literature.

Economists need not, of course, assume that any bill that makes it into law is for that reason efficient. Far from it; there are many economic criticisms of statutes. But economists do need to offer some explanation why something popular enough to get through the legislative process nonetheless does not promote efficiency. There are several possible answers, all eminently familiar. One might be that the bill is popular with a majority of the voters, but imposes extremely high costs on the minority. If the costs on the minority are high enough, then they will outweigh the benefits to the majority. But a majority will still approve, and the bill will get passed. This is an argument about the distributional consequences of the legislation.

Another is that a small group of people who would be benefitted by the rule are sufficiently centrally situated in the political process that they can promote their legislation, even though it hurts the majority. This can happen even in a democracy, either through glitches in the political process (something in the committee structure of Congress that is antidemocratic) or because the small group of people care much more intensely about the consequences than a large group who stand to gain or lose only a small amount per person. It is easier to organize small groups of intensely interested persons because small groups have fewer "free rider" problems. The small group, through its superior organization and motivation, is then able to "capture" the legislative process.

These are probably the two best-known explanations for why legislation might be inefficient. But the distributional and capture explanations do not do much good in the antidiscrimination context. Support for antidiscrimination law seems (at least currently) to be fairly broad based. Both theories require that there be some minority which is more intensely interested in the question than the median voter; presumably this would be members of minority groups. But one can hardly describe this group as having captured the legislative process to the detriment of the majority (as the second theory would require.) Minorities are just not politically powerful enough for this to be credible.³⁹ And the first theory — the majority imposing serious costs on a powerless minority — does not explain the legislation either. If anything, this description fits the state of affairs prior to the adoption of Title VII, in which minorities were discriminated against.

39. Another, perhaps, might be a cabal of liberal public interest types?

So the claim that the popularity of Title VII shows that it is utility enhancing does not lead to the unacceptable conclusion that all statutes are utility enhancing. It recognizes that the democratic process produces inefficient results in some cases; it is just that Title VII seems not to be one of them. The second objection to meet is that if Title VII is in fact so popular, then why do we need civil penalties to enforce it? If we all condemn discrimination, then we can eradicate discrimination by simply all refusing to discriminate. Conversely, the fact that we do seem to need a statute suggests that it is not really so popular, and perhaps therefore not utility enhancing.

The obvious answer to this objection points to collective action problems. While we might all be better off in the long run if there was no discrimination, each of us may in the short run be tempted to cheat. Perhaps, for instance, one employer believes that women are more likely to quit to have children, or that minority youths are more likely to have undiscoverable arrest records. Or perhaps one's current workforce would prefer that the employer hire people just like them. "Why take the chance?" wonders the self-interested employer. Once we make the transition from *Z* to *A*, these inferences would not be "rational" even in the short run, because race would have no predictive value. But we are never going to make the transition if everyone is free to discriminate; everyone will prefer that "the other guy" be the one to pay the transition costs of moving to a race-blind society.

In one sense, discrimination problems call particularly strongly for collective solutions. Some other sorts of employment relations problems might be solvable on a case-by-case basis, with each worker paying for the level of protection that he or she prefers. For example, if a worker prefers to work in a smoke-free environment, or one offering a better medical plan, then he or she could arguably negotiate an employment contract offering this package of benefits.⁴⁰ But it is not possible for the individual black worker to pay the employer not to discriminate against him. Imagine that whites are all paid ten dollars an hour, and the black applicant is offered only nine. It will not solve the problem for the black to somehow offer the employer one dollar an hour to be paid the same ten dollars an hour as

40. I am taking no stand on either the practicality or ethical desirability of imposing this burden on workers; my point is simply that individually tailored agreements might, at least in theory, be available in such circumstances.

the whites. The black, obviously, would still (justifiably) feel discriminated against.⁴¹ Collective action is necessary because the objective is that people from different ethnic groups should be treated the same; upgrading one's own status by itself will not do the trick.

Because of the strong popular preferences for equality of opportunity, utilitarianism is not a promising weapon in the fight against antidiscrimination law. But it is not clear that Epstein really wants to hitch his wagon to Kaldor-Hicks efficiency anyway. In particular, one suspects that it is too potent an argument for his taste, authorizing the government to do all sorts of utility enhancing things that Epstein would find distasteful. Given his evident enchantment with the more restrictive theories of legislation — theories such as libertarianism and freedom of contract — his reliance on utilitarianism has a somewhat opportunistic cast. Utilitarianism simply comes in handy whenever Title VII appears to be vulnerable on efficiency considerations. But utilitarianism is not where Epstein's heart is. No matter how clearly Title VII satisfied the efficiency criterion, Epstein probably would not care a whit. So we have to turn to philosophical arguments probably closer to the core.

B. Libertarianism

The reason that popularity poses such problems for a utilitarian critique of antidiscrimination law is the utilitarian reliance on subjective preferences. Utilitarianism just takes subjective preferences as they stand, totes them up, and evaluates the state of the world accordingly. Utilitarianism, in addition, takes into account the preferences of all people, no matter how remote they are, if they have experienced the consequences. If Epstein wants to critique a popular piece of legislation, he's better off using some philosophical theory less sensitive to popular opinion. Libertarianism and freedom of contract both seem promising because they appear to be more insulated from popular preferences. Both seem to have a greater capacity to invalidate actions based on preferences (such as a preference for equality) that people actually have. Libertarianism and freedom of contract tend to focus solely on the parties to governmental regulation, excluding from consideration the preferences of strangers to the transaction.⁴² The wide preferences of the population as a whole —

41. This is why it is pointless to suggest that the black applicant could "solve" the problem by upgrading her qualifications. Even if the applicant could thereby get the job she sought, she would still be discriminated against because she would need to have better credentials to get the job than a white. As pointed out earlier, the injury of being denied a job is different from the injury of being discriminated against.

42. There are some circumstances in which the interests of nonparties would be relevant, such as if two individuals entered into an agreement to rob or attack a third person. Such examples are not of much practical importance in the antidiscrimination

and, thus, the popularity of a measure — are not important.

Yet libertarianism and freedom of contract do not get away entirely from reliance on subjective preferences. Both theories, after all, are voluntaristic. Both typically treat preference formation as exogenous, to be determined by the individual according to his or her own tastes or even whims. The libertarian is as solicitous of the life choices of the beer-swilling, pornography-reading jet-ski cowboy as the bookish intellectual. The freedom of contract theorist would enforce gambling contracts, cognovit clauses, and contracts to work for less than the minimum wage, as well as individually dickered terms between sophisticated parties of equal bargaining power.⁴³ Both theories have a role for subjective preference, and in both cases it is an important one.

There is an obvious affinity between libertarian and freedom of contract theories. We said earlier that libertarianism has more of a negative rights focus — a focus on the right to be left alone — while freedom of contract focuses on one's affirmative right that the state enforce a contract into which one has freely entered. The characteristic libertarian problem with antidiscrimination law, then, concerns the individual who would prefer not to enter into the employment contract (because he would rather not hire black people, or would rather not hire them at the same wage as white people) but who is compelled to do so by law. The most characteristic freedom of contract problem concerns the person who would like to enter into a discriminatory contract but is unable to do so.

Libertarianism, roughly speaking, focuses on the rights of white people. Antidiscrimination law does not impinge on the rights of black people because they are never required to enter into a contract that they do not like. They cannot be sued for failing to apply for a job, or failing to take one that is offered.⁴⁴ When libertarians complain about antidiscrimination law, then, they have in mind the rights of people that antidiscrimination law restrains, and these are by and large members of the dominant group in society. Freedom of

context, and are not the focus of Epstein's analysis.

43. Note that some may draw the line, however, at contracts to sell oneself into slavery.

44. Note, however, that a black person could be required by law to enter into a contract with (say) a woman or an Asian. I do not consider these extra permutations because for purposes of exposition I am focusing on the simplest case, where there are only two groups — white and black. In addition, a black could be sued for discriminating against other blacks. Setting these complications aside, the general point remains: Title VII protects members of disfavored groups, and the libertarian argument rejects that focus, shifting the balance back.

contract arguments have a different focus. In theory, they uphold the contract rights of all people who want to enter into discriminatory contracts. As a rhetorical matter, however, freedom of contract theorists tend, as Epstein does, to assert that the ability to contract (even at a discriminatory rate) helps the disadvantaged group. This stance is rhetorically attractive because it is designed to show that liberal policy backfires; it hurts the very people it was designed to help.

But even though libertarianism and freedom of contract tend to focus on rather different groups of people, they are still designed to protect the subjective preferences of these people. They are not designed for, and they are not effective in, arguing that people should change the preferences that they have or that government should attempt to cause people to change them. It is for this reason that popularity poses a problem for libertarian and freedom of contract theory as well as for utilitarianism.

So let us start with libertarian theory. To the extent that core antidiscrimination norms are widely held it seems that people do not attach a very high value to the right to refuse to deal with people on the basis of their race. Of course, as already noted, there are some areas outside the core of antidiscrimination law that are quite controversial. Perhaps some people highly prize their right not to practice affirmative action. In addition, there are some areas of life that we consider so intimate that we do not want the government involved even if its purpose is to prevent discrimination. Few people want the government to choose with whom they will have dinner, with whom they will share an apartment, or with whom they will have sex. We apparently feel differently about with whom we will be in the army, whom we will take on as students, and whom our colleagues will be. Or, at least, most of us do.

Now what about the rest? This is where the libertarian argument seems to gain momentum, for it concerns itself with the rights of particular people to the specific transaction, rather than with what the vast bulk of the populace prefers. If the liberties of specific individuals are violated, this is adequate basis for criticism even if everyone else approves. So we need only locate some members of the dominant group who choose not to enter into contracts with blacks (or, not to enter into contracts with blacks on the same terms as whites) and the libertarian argument is back in business.

Libertarians might at this point be tempted simply to point to the fairly large numbers of Title VII defendants as evidence for the fact that some whites prefer not to deal with blacks. But this will not do. First, as already noted, this discussion focuses on core Title VII violations — litigation over affirmative action and disparate impact is beside the point. We should also not assume that all Title VII defendants did discriminate. Some of them are found innocent, after

all. But there are still some white defendants who lose their cases, who are guilty of core violations, and who clearly were attempting not to hire blacks on the same terms as whites. (And as any member of a disadvantaged group could surely tell you, there are other discriminatory employers out in the field who never get dragged into court because the proof problems are insurmountable.) So what about these folks?

The strongest version of the libertarian argument, undoubtedly, is the one that focuses on them. But even here we have problems. Compare the prohibition against discrimination to prohibitions that libertarians clearly approve, such as those on force, fraud, or breach of contract.⁴⁵ Obviously, defendants in assault, fraud, or breach of contract actions must all be dragged kicking and screaming into court. They clearly do not like the law at the point that they are caught violating it. The fact that imposing a legal remedy violates the defendant's liberty is not relevant; and neither is the fact that at the time of the violation, the defendant chose to disregard the law. Obviously, some impingements on liberty are acceptable to libertarians. Why is the prohibition on discrimination different from the prohibition on fraud?

Epstein apparently believes that the difference is that discrimination does not harm people because they are left free to go to another employer. He claims that assault or theft leaves you in a worse position than if there had been no interaction, while discrimination just leaves you in the same place — jobless.⁴⁶ But as already noted, this claim manifests a fundamental misunderstanding about the gravamen of the complaint. The complaint is not merely that you did not get a job. It's that you were discriminated against. Even if you were offered your dream job by another employer on the very next day, you would still experience the sting of discrimination.⁴⁷

45. Recall that Epstein does not list contract enforcement as a legitimate goal of government; he lists only prohibitions on force or fraud. *See supra* note 11. I add contract enforcement, however, because without it his freedom of contract argument makes little sense.

46. FORBIDDEN GROUNDS, *supra* note 1, at 30.

47. It is a different question whether money damages should be awarded in such a case. We might choose not to award damages on the grounds that the law cannot accurately measure the psychological harm; thus, where the second job paid as well, we could find discrimination but deny monetary relief. But this does not mean that the law could not if it wanted to provide recovery. If the absence of measurable monetary damages meant that there was no harm, and if this were thought fatal by libertarians, then there could be no money damages in many rape cases; indeed, it would mean that many rapes (or other assaults not necessitating medical care) could not be criminally punished.

Not offering a job seems like a simple failure to extend a benefit; because discrimination occurs in the context of a failure to act, it seems inactionable under a libertarian system. But the fact that it occurs in this context does not mean that it is for that reason beyond the government's reach. If I decide to shoot every student who applies unsuccessfully for a job as my research assistant, I cannot defend myself on the grounds that I merely failed to offer them the job. If I badger them and deliberately humiliate them until they are driven from my office in tears (and then publish accounts of the interviews in the student newspaper, causing them all to have nervous breakdowns), I have surely done more than refuse to extend some benefit that they desired. The fact that some other professor may subsequently hire one or all of them at the same pay does not really set things right.

Of course, Epstein might claim that it is very foolish of people to be bothered by discrimination if they are able to get a comparable job the very next day. This response, though, would manifest a willingness to instruct us on what our preferences ought to be, which would be unseemly for someone who criticizes colleagues for doing just that.⁴⁸ How, then, is a libertarian to determine which harms to others can be prohibited by tort or criminal law?⁴⁹ Epstein's discussion of fraud, conclusory as it is, is instructive:

The standard prohibition against force and fraud does not depend on a simple assertion that killing or murder is just illegitimate. Rather, it rests on the powerful, albeit empirical, judgment that all people value their right to be free from coercion far more than they value their right to coerce others in a Hobbesian war of all against all. The prohibition *ex ante* is therefore thought to work to a (well-nigh) universal advantage.⁵⁰

When one applies this standard to core discrimination, the parallel is self evident. The standard prohibition against discrimination does not depend (merely) on a simple assertion that discrimination is just illegitimate. Rather, it (also) rests on the powerful, albeit empirical, judgment that people value their right to be free from discrimination far more than they value their right to discriminate against others.⁵¹

48. FORBIDDEN GROUNDS, *supra* note 1, at 304.

49. This is of course a classic problem in liberal political philosophy. See 1 JOEL FEINBERG, *THE MODEL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* (1984).

50. FORBIDDEN GROUNDS, *supra* note 1, at 75. He then goes on to say, "But there are no similar universal gains from a rule that says people who have distinct and distasteful preferences cannot go their own way by working and associating only with people of similar views." *Id.* This is a complete red herring. Antidiscrimination law does not require people to work with other people of distinct and distasteful preferences. It prohibits choice on the basis of race, sex, and other prohibited criteria. That is why it is so widely approved.

51. Epstein is probably wrong to eliminate moral judgments entirely from the motivation behind the laws against murder. If we thought some conduct completely justifiable, then we would probably want to reconsider the simple desire to penalize it because we happen not to like it — even (no, especially) under a libertarian theory.

If there is anything that is clear, it is that people do not like to be discriminated against. White males are no exception, as the fierce debates over affirmative action and the reverse discrimination suits amply testify. Under Epstein's view, it all boils down to what we happen to care about. And this explains the relevance of the popularity argument to libertarian theory, and the relevance of subjective preferences. It is not that a majority of the population likes Title VII, but that the vast majority of the population prefers to give up a not-very-highly-valued freedom to discriminate, and to receive in exchange a right to live free of discrimination for themselves and their fellow citizens.

The last chance to save this libertarian argument against Title VII might rest on a claim that laws against force and fraud are universally favored, while laws against discrimination are somewhat less widely approved. There are more dissenters, in other words, and it is the dissenters that libertarianism favors. Here we run into some problems. There's fraud and there's fraud. It is not all the same, and it is not all universally condemned. Securities fraud, for instance, is viewed differently in some quarters from defrauding frail widows of their life savings. Epstein at various points seems to think that there is something special about fraud, *per se*.⁵² But at other points it seems just to be a matter of what happens to be universally disapproved — in which case it would all boil down to a question of popular opinion. And even with regard to force, there are differences of opinion on what ought to be condemned. There are people who do not take rape very seriously at all, especially if the woman "asked for it." Can it be prohibited because it is "force"? Or must it be permitted because some individuals value their right to rape more than their right to be free from rape?⁵³ We should be wary of assuming too quickly that prohibitions on violence are valuable to all. The Somali warlords are doing pretty well for themselves — they do not need the intervention of a United Nations police force, thank you. There are always some who stand to benefit more from anarchy and violence than from establishment or restoration of order.

This is a familiar complaint against libertarianism. Exactly how

52. At least that would explain why he singles out force and fraud as the basis for government coercion. *FORBIDDEN GROUNDS*, *supra* note 1, at 4, 19.

53. Recall that although most victims of rape are women, not all are. A man does give up something when he gives up his right to be free of rape, although it is clearly of less value than the woman's right to be free of rape. In this sense, discrimination is comparable, for the right of a white male not to be discriminated against is less valuable than the right of a black woman not to be discriminated against.

unanimous does approval of government action have to be?⁵⁴ Why should prohibitions on force or fraud be adopted without universal approval? Can a single dissenter grind the legislative processes to a halt? Even apparently clear examples of legitimate regulations, such as the prohibition on murder, have their controversial aspects, such as whether to permit an insanity defense or whether abortion may be criminalized. Unanimity just isn't possible. Even libertarians are not willing to place the power to make or break a piece of legislation in the hands of the last remaining hold out. This is a point to which we will return at the conclusion. Before that, however, we must consider the final remaining basis for rejecting Title VII: freedom of contract.

C. Freedom of Contract

Although Epstein styles himself a libertarian, there are respects in which his arguments sound more in freedom of contract. When he writes eloquently of the ways minorities suffer from their legal disabilities preventing entrance into discriminatory contracts, he is not making an argument for the "nightwatchman" state, but a call for affirmative governmental action. Libertarianism is a broad and complete political theory about a wide range of things that government should not get itself involved with. Freedom of contract is a much more specific argument about a particular right which government has an affirmative obligation to support; namely, the right to enter into legally enforceable voluntary agreements.

But who is he protecting? So far as I am aware, few if any blacks are demanding the right to enter into discriminatory agreements. One hesitates to make sweeping generalizations, but I have become disheartened in my search for counterexamples.⁵⁵ It is interesting, in this respect, to compare the way in which the freedom of contract argument works in other contexts. It is possible to find women who want to challenge women's protective legislation (maximum hour laws, for example) because there are women that find such laws disadvantageous.⁵⁶ But these, of course, were laws that discriminated against women. It is a lot harder to find blacks or women who want to challenge a law that says that they have to be hired on equal terms. Epstein is straining to protect a "right" that the "owners" are happy to waive.

This argument, of course, leaves the rights of white employers out

54. See, e.g., IAN SHAPIRO, *THE EVOLUTION OF RIGHTS IN LIBERAL THEORY* 151-203 (1986) (criticizing Nozick).

55. Epstein, no doubt, will come up with some.

56. Cf. *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991). There may also be workers who want to challenge prohibitions on nonunion contracts.

of the picture. It is rhetorically understandable that Epstein's arguments focus on the legal disabilities to blacks, but as a theoretical matter the argument is symmetric. Whites, also, are prohibited from entering into contracts that discriminate against blacks, and perhaps this presents a freedom of contract problem. Some whites might want to; is this a problem?⁵⁷ Probably not, for it takes two to contract as well as to tango. The employer has no abstract right to a contract with anyone at a discriminatory wage. If no one wants to contract with him or her, then freedom of contract provides no remedy at all. If no blacks want to be hired on discriminatory terms, in other words, the employer has no "freedom of contract" complaint.

For a freedom of contract problem to exist, there must be two willing individuals who would voluntarily enter into a contract if the law did not prohibit their chosen terms. This is precisely what the popular support for Title VII renders improbable. Again, subjective preferences enter the picture. Freedom of contract attaches a high priority to the preferences people actually possess. It is theoretically possible that Epstein is correct that women and minorities would be much better off if they would swallow their pride and accept a job at lower wages. Until they come to thirst for the objectively valuable opportunity to be discriminated against, however, freedom of contract theory cannot tell them that a preference for Title VII is misguided. In this regard, the freedom of contract challenge is more difficult to mount than the libertarian one, for the former is defeated if one can merely show that no blacks want the right to discriminatory employment. This would probably be easier than showing that no whites want the right to refuse to deal with blacks.

But surely, one might think, freedom of contract is offended by the fact that this theoretical avenue is foreclosed, regardless of whether they choose to pick up on it. Doesn't freedom of contract require the widest possible latitude for contractual possibilities, even if no person presently existing would want those terms? What about the fact that many minorities might in fact accept such contracts in at least some circumstances if Title VII did not exist?⁵⁸ Does this

57. Note that we have something of the same unanimity issue as with the discussion of libertarianism, because it is not clear whether there are many white employers that want this right (at least, that want it *ex ante*).

58. Of course, some might choose not to accept discriminatory terms. They might instead prefer to work at a different and overall less desirable job, on the theory that they were at least not being discriminated against. According to the standard economic arguments about such circumstances, this would displace some other worker, who would then have to go to a lower rank to get a nondiscriminatory job, and so on down the ladder.

show that the right to a discriminatory contract is a valuable which should be preserved? How can it be fair for the government to step in and prohibit a contract that the parties would make in the absence of legislation, even if it is a contract that one of the parties (in some sense) does not want?

Here one must ask oneself why it is that a black would want the government to prohibit a contract that he or she might voluntarily enter into if no prohibition existed. The answer seems pretty clear. First, it is possible that there is a general lack of confidence in the black community about the alarming predictions some economists make about the resulting decrease in jobs available to blacks. If so, then blacks have nothing to lose by giving up the right to enter into discriminatory agreements. People might also be forgiven for assuming that once Title VII helped blacks to start entering the workforce, their accomplishments would be appreciated and employers would be willing to hire them in greater numbers. Better to hold out, then, for jobs on equal terms even if there are a smaller number of them — they would have an educational effect.⁵⁹ People might be willing to take a risk that they will be the one to lose a job, because it would promote the general well-being of the community.

Or, blacks might actually believe that the white community would comply with the law, rather than resorting to subterfuge as Epstein predicts. They might hope that the legal remedies that Title VII provides would afford some compensation to the injured party, and would have some deterrent effect.⁶⁰ Black people have apparently felt, and still feel, that they are better off without the freedom to enter into a discriminatory contract. Arguments that it can be strategically sound to give up one's power to enter into a deal that one does not want anyway are standard fare in the game theory literature.⁶¹ Title VII in effect allows blacks to make a legally binding waiver of the "right" to be discriminated against.

Now it might be proclaimed that even if it is strategically sound to

The minority who would have been at the very bottom of the ladder would then get bumped off the bottom (there being nothing below, because of the minimum wage laws) and so we would still get some individuals who would be denied a job by being unwilling to work on discriminatory terms.

59. Note Epstein's argument on the educational effect on employers of familiarity with particular black workers. *FORBIDDEN GROUNDS*, *supra* note 1, at 263. If employers are able to learn that particular blacks are worthy of employment, they are probably also capable of learning that blacks, as a general matter, make good employees.

60. Epstein's argument would be equally at home in the criminal context, where we could argue that it is unwise to prohibit bank robbery because people who really have a taste for robbery will only switch over to muggings or white collar crime. Whatever the empirical validity of such arguments — I know of no data — we typically choose not to be blackmailed by the threat to commit some other ugly deed if the first is thwarted.

61. Compare the plight of the kidnapping victim who is asked to make an enforceable promise to pay the ransom. Does he or she want the power to make the promise?

give up the power to enter into a discriminatory contract, the government has no proper role in facilitating such a strategic choice. Here the argument tips its hat to the libertarian approach, for one might say that the "nightwatchman state" should not get involved in such social engineering projects as facilitating the making of binding waivers. The government should stick instead to the basic meat and potatoes law — preventing force and fraud, and enforcing contracts. But such an argument sits oddly with the basic freedom of contract claim. A major objective of contract law is to give people the means to make enforceable commitments for strategic purposes. Gains from trade are possible if one can give up some of one's power, namely the power to welsh on a deal voluntarily made. The commitment strategy to give up the right to make discriminatory contracts seems little different. Minorities are asking the government to take away a power that they find strategically disadvantageous. They feel that they will be better off overall without the dubious capacity to enter into discriminatory agreements.⁶² Freedom of contract theories should recognize the government's roles in empowering people this way, particularly if there seem to be no minority individuals who consider relinquishing the power to be a loss.

CONCLUSIONS

The soundest theoretical argument Epstein has is probably a libertarian argument based on a unanimity (or near unanimity) requirement. Even if most white people are willing to give up the right to hire only whites, a small number of dissenters (or a single dissenter) can veto the law.

Unfortunately, this argument leaves us with few laws standing. Prohibitions on force and fraud are not the exceptions Epstein thinks they are. Once he opens the door to nonunanimity, there seems to be no logical stopping point — what kind of super majority, precisely, is required? Why is repression of even a single dissenter justifiable? Why is force, fraud, or contract, different? But if he insists on unanimity, he is unlikely to have many followers.

The libertarian argument proves too much for most people's tastes and political beliefs. It threatens to invalidate not only the New Deal-type laws that Epstein so dislikes, but government funding of roads and schools. If the bottom line of Epstein's book is that Title

62. Note that they can still work under discriminatory terms; it is just that they cannot effectively promise their discriminating employers that they will not later sue.

VII is no more defensible than (gasp!) the federal highway program, . . . well, I can live with that.

It is hard to know exactly how many people would like to get rid of the core prohibitions of Title VII. So far, the antidiscrimination principle seems to be holding as a moral consensus, and most of us seem to think that it is of long range practical value as well. I do not have the numbers, but it does not seem that I need them, given that Epstein himself starts out with the premise the Title VII is widely (almost universally) popular. Except for Epstein, how many people are complaining? He should perhaps get to work on the rather uphill battle of trying to persuade private individuals to change their beliefs that racial discrimination is wrong. It is lonely being a libertarian.